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Federal Register Notice

DEPARTMENT OF JUSTICE Antitrust Division

United States v. Bazaarvoice Inc.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Northern District of California in United States of America v. Bazaarvoice, Inc., Civil Action No. 13-00133. On January 8, 2014, the Court held that Bazaarvoice, Inc.'s June 2012 acquisition of PowerReviews, Inc. violated Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment requires Bazaarvoice to divest the assets it acquired from PowerReviews and adhere to other requirements to fully restore competition in the provision of online product ratings and reviews platforms.

Copies of the Complaint, Stipulation, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's Web site at <http://www.usdoj.gov/atr>, and at the Office of the Clerk of the United States District Court for the Northern District of California. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the U.S.

Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the Federal Register. Comments should be directed to James J. Tierney, Chief, Networks and Technology Enforcement Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202-307-6200).

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**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAZAARVOICE, INC.

Defendant.

Case No. 13-cv-00133 WHO

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief remedying the June 2012 acquisition of PowerReviews, Inc. (“PowerReviews”) by Defendant Bazaarvoice, Inc. (“Bazaarvoice”). The United States alleges as follows:

INTRODUCTION

1. Many retailers and manufacturers purchase product ratings and reviews platforms (“PRR platforms”) to collect and display consumer-generated product ratings and reviews online. Bazaarvoice provides the market-leading PRR platform, and PowerReviews was its closest competitor. No other PRR platform competitor has a significant number of PRR platform customers in the United States. By acquiring PowerReviews, Bazaarvoice eliminated its most significant rival and effectively insulated itself from meaningful competition.

2. The acquisition of PowerReviews was a calculated move by Bazaarvoice that was intended to eliminate competition. Bazaarvoice’s senior executives spent more than a year considering whether buying PowerReviews would reduce pricing pressure and diminish competition in the marketplace. As a result of their extensive deliberations, the company’s business documents are saturated with evidence that Bazaarvoice believed the acquisition of PowerReviews would eliminate its most significant competitive threat and stem price competition.

3. In April 2011, Brant Barton, one of Bazaarvoice’s co-founders, outlined the benefits of the acquisition in an e-mail to senior Bazaarvoice executives. He noted that acquiring PowerReviews would “[e]liminat[e] [Bazaarvoice’s] primary competitor” and provide “relief from [] price erosion.” He also discussed the absence of competitive alternatives for customers, concluding that Bazaarvoice would “retain an extremely high percentage of [PowerReviews] customers,” because available alternatives for disgruntled customers were “scarce” and “low-quality.”

4. On May 4, 2011, Brett Hurt, Bazaarvoice’s Chief Executive Officer, supported Barton’s analysis and advocated the company’s pursuit of PowerReviews in an e-mail to the Bazaarvoice board of directors. According to Hurt, the acquisition of PowerReviews was an

opportunity to “tak[e] out [Bazaarvoice’s] only competitor, who . . . suppress[ed] [Bazaarvoice] price points []by as much as 15%”

5. Two days later, Barton, Hurt, and Stephen Collins, Bazaarvoice’s Chief Financial Officer, met with senior PowerReviews executives to discuss the potential acquisition. In his notes from the meeting, Barton wrote that the transaction would enable the combined company to “avoid margin erosion” caused by “tactical ‘knife-fighting’ over competitive deals.” He later prepared a presentation for Bazaarvoice’s board of directors in which he claimed the transaction would “[e]liminate [Bazaarvoice’s] primary competitor” and “reduc[e] comparative pricing pressure.”

6. In October 2011, Collins e-mailed other senior Bazaarvoice executives to provide his perspective regarding the potential acquisition. He recommended that Bazaarvoice continue its pursuit of PowerReviews because he feared price competition with PowerReviews would impair the long-term value of Bazaarvoice’s business. Collins believed that Bazaarvoice had “literally, no other competitors,” and he expected “pricing accretion” from the combination of the two firms. In November 2012, Stephen Collins replaced Brett Hurt as Bazaarvoice’s Chief Executive Officer.

7. In November 2011, Hurt sought permission from Bazaarvoice board members to continue exploring a potential deal with PowerReviews, observing that Bazaarvoice would have “[n]o meaningful direct competitor” after acquiring PowerReviews, thereby reducing “pricing dilution.”

8. In December 2011, Collins and Barton met with PowerReviews representatives again. Following the meeting, Collins prepared a memorandum for Bazaarvoice’s board of directors to outline the expected benefits of the acquisition. He wrote that the acquisition of PowerReviews would (1) “eliminat[e] feature driven one-upmanship and tactical competition;”

(2) “[c]reate[] significant competitive barriers to entry;” (3) “eliminate the cost in time and money to take [PowerReviews’] accounts;” and (4) “reduce [Bazaarvoice’s] risk of account losses as [PowerReviews] compete[d] for survival.”

9. In May 2012, Bazaarvoice executives completed their due diligence for the acquisition. To support their recommendation to proceed with the acquisition of PowerReviews, they prepared a 73-page memorandum for the company’s board of directors. In this memorandum, the executives touted the transaction’s dampening effect on competition, concluding the acquisition would “block[] entry by competitors” and “ensure [Bazaarvoice’s] retail business [was] protected from direct competition and premature price erosion.”

10. Bazaarvoice’s acquisition of PowerReviews closed on June 12, 2012. The purchase price, including cash and non-cash consideration, was approximately \$168.2 million.

THE DEFENDANT AND THE TRANSACTION

11. Bazaarvoice is a publicly traded Delaware corporation and is headquartered in Austin, Texas. During its 2012 fiscal year, Bazaarvoice earned approximately \$106.1 million in revenue.

12. PowerReviews was a privately held Delaware corporation. Before the transaction, PowerReviews was headquartered in San Francisco, California. During the 2011 calendar year, the company earned approximately \$11.5 million in revenue.

JURISDICTION

13. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to restrain Bazaarvoice’s violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

14. This Court has subject matter jurisdiction over this action under Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25, and 28 U.S.C. §§ 1345 and 1331. This Court also has

subject matter jurisdiction under 28 U.S.C. § 1337, as Bazaarvoice is engaged in a regular, continuous, and substantial flow of interstate commerce and activities substantially affecting interstate commerce. Bazaarvoice sells PRR platforms throughout the United States.

15. This Court has personal jurisdiction over the Defendant. Bazaarvoice transacts business and is found within the Northern District of California.

VENUE

16. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b) and (c).

INTRADISTRICT ASSIGNMENT

17. Assignment to the San Francisco Division is proper because this action arose in San Francisco County. A substantial part of the events that gave rise to the claim occurred in San Francisco, and PowerReviews' headquarters and principal place of business was located in San Francisco before the transaction. Bazaarvoice continues to use PowerReviews' former headquarters as its San Francisco office.

PRR PLATFORMS

18. PRR platforms enable manufacturers and retailers to collect, organize, and display consumer-generated product ratings and reviews online. Consumer-generated product ratings and reviews ("ratings and reviews") represent feedback from consumers regarding their experiences with a product. These submissions are displayed on a retailer's or manufacturer's website, allowing other consumers to read feedback from previous buyers before making a purchasing decision. PRR platforms can range from simple software solutions a company has developed with internal resources to sophisticated commercial platforms offering a combination of software, moderation services, and data analytics tools.

19. Ratings and reviews are a popular feature for retailers and manufacturers to display on their websites. Ratings and reviews can provide highly relevant, product-specific information on a retailer's or manufacturer's website near the time of purchase. The additional information provided by ratings and reviews can increase sales, decrease product returns, and attract more consumers to a retailer's or manufacturer's website. Ratings and reviews also can provide valuable data about consumer preferences and behavior, which retailers and manufacturers can use to make inventory purchasing or product design decisions.

20. Ratings and reviews may also benefit a retailer or manufacturer by boosting a product's ranking on a search engine results page. Internet search engine algorithms generally assign higher rankings to websites with fresh and unique content. Ratings and reviews are frequently updated, and this content is highly tailored to the retailer's or manufacturer's product catalog. Accordingly, when ratings and reviews are indexed by a search engine, the underlying product pages will likely receive a higher ranking on a search engine results page.

21. From a consumer's perspective, ratings and reviews are useful because they can provide authentic information regarding another consumer's experience with a particular product. Feedback from other consumers can help a prospective buyer make a more informed purchasing decision. Product ratings and reviews often provide information that is not easily ascertainable when shopping online (*e.g.*, quality of construction, fit, durability).

22. The software component of a PRR platform provides the user interface and review form for the collection and display of ratings and reviews. Most review forms prompt consumers to rate a product on a five-star scale and offer consumers an option to write an open-ended comment about their experience with the product. Other forms also allow consumers to rate products along several dimensions (*e.g.*, product appearance, ease of assembly, value).

23. In addition to the technology components of their respective platforms, some PRR platform providers also provide moderation services. After a consumer submits a review, the PRR platform provider applies software algorithms to scan the submission for inappropriate or fraudulent content. After the automated scan, a human moderator examines each submission to ensure it complies with a particular client's moderation standards. These moderation standards may vary between clients. For example, some clients may prefer not to display references to their competitors on their websites.

24. After moderation, the PRR platform publishes approved submissions in a display interface on a client's website. Many PRR platforms display a summary of a product's rating and review information and allow consumers to view individual reviews for more detailed information. The review summary may display the number of reviews, the product's average overall rating, a review distribution histogram, or information related to particular product attributes. The display interface may also allow consumers to filter reviews according to their interests.

25. Sophisticated PRR platforms allow manufacturers to share, or "syndicate," ratings and reviews with their retail partners. Through the syndication network, retailers can display reviews that were originally collected by a product's manufacturer. Syndication helps retailers obtain more content than they could independently. Manufacturers and retailers both benefit from the ability to display more reviews at the point of sale. Syndication between a manufacturer and a retailer using different PRR platforms is possible, but requires expensive, customized integration work to connect the platforms.

26. Some PRR platforms also include analytics software that manufacturers and retailers use to analyze information collected from ratings and reviews. With these tools, manufacturers and retailers can track and analyze real-time consumer sentiment. Manufacturers

and retailers can use this information to identify product design defects, make product design decisions, or identify consumers for targeted marketing efforts.

27. PRR platforms are sold by Bazaarvoice and other commercial suppliers in direct sales processes that require a significant amount of time and negotiation. Prices are individually negotiated, and each customer's price is independent of the prices that other customers receive. Arbitrage, or indirect purchasing from other customers, is not possible because customers cannot re-sell PRR platforms that they have purchased from a commercial supplier. Accordingly, customers commonly receive different prices, even when purchasing similar products and services.

28. PRR platform providers negotiate prices in light of each customer's demand characteristics, taking into account competitive alternatives. Bazaarvoice calls this method of setting prices "value-based" pricing, meaning "the more value the [client] perceives, the higher [Bazaarvoice's] price point." During the sales process, it is typical for a salesperson to ask the prospective customer to divulge detailed information related to its business, which may include information related to (1) annual volume of online sales; (2) product return rates; (3) historic conversion rates; (4) e-commerce vendor relationships; or (5) project budgets. This process enables the PRR platform provider to assess the prospect's willingness to pay for a PRR platform. After acquiring as much information as possible about the prospect, the PRR platform provider offers a price that aligns closely with its perception of the prospect's willingness to pay for its product.

29. Throughout the course of the sales process, a salesperson will also ask whether a prospective customer is considering other competitive alternatives. In most cases, the presence of competition is relatively transparent. Prospects routinely reveal the identity of competitors during negotiations and may even reveal the terms of competitive offers to improve their

bargaining position. Accordingly, suppliers adjust their pricing to account for other competitive offers, depending on the nature of the threat posed by the competition.

RELEVANT MARKET

30. PRR platforms used by retailers and manufacturers are a relevant product market and “line of commerce” within the meaning of Section 7 of the Clayton Act.

31. The United States is a relevant geographic market. PowerReviews was routinely the only significant competitive threat that Bazaarvoice faced in U.S.-based sales opportunities. As a result of the transaction, Bazaarvoice will be able to profitably impose targeted price increases on retailers and manufacturers based in the United States.

ELIMINATION OF HEAD-TO-HEAD COMPETITION BETWEEN BAZAARVOICE AND POWERREVIEWS WILL HARM RETAILERS AND MANUFACTURERS

A. Bazaarvoice’s acquisition of PowerReviews eliminated the company’s closest competitor and is likely to substantially lessen competition.

32. Before the acquisition, Bazaarvoice was the leading commercial supplier of PRR platforms, and PowerReviews was its closest competitor by a wide margin. Bazaarvoice’s former CEO acknowledged that “PowerReviews is [Bazaarvoice’s] biggest competitor,” and the company’s decision to acquire PowerReviews was bolstered by its current CEO’s belief that there are “literally, no other competitors” in the market. Through the removal of its most significant rival, Bazaarvoice acquired the ability to profitably raise the price of its platform above pre-merger levels. In fact, Bazaarvoice’s current CEO pressed for the company to acquire PowerReviews because he anticipated “pricing accretion” due to the consolidation of the two firms.

33. Prospective customers routinely played Bazaarvoice and PowerReviews against each other during negotiations. Consequently, a Bazaarvoice “playbook” for competing with

PowerReviews mandated that “[p]ricing only [be] delivered when [the customer’s] BATNA and ZOPA have been clearly identified.” BATNA and ZOPA are acronyms which stand for “best alternative to negotiated agreement” and “zone of possible agreement.” For many manufacturers and retailers, PowerReviews was the best alternative to a negotiated agreement with Bazaarvoice. Accordingly, competitive pressure from PowerReviews frequently forced Bazaarvoice to offer substantial price discounts.

34. Other commercial suppliers of PRR platforms are not sufficiently close substitutes to Bazaarvoice’s platform to prevent a significant post-merger price increase. PowerReviews was the most substantial restraint on Bazaarvoice’s conduct in the United States before the merger, and no other competitor was a comparable rival. Bazaarvoice now faces virtually the same competitive landscape of “scarce” and “low quality” alternatives that Brant Barton identified in April 2011.

35. The absence of other meaningful competitors also has been recognized by both industry analysts and PowerReviews’ former CEO, Pehr Luedtke, in calling the PRR platform market a “duopoly.” Erin Defossé, Bazaarvoice’s Vice President of Strategy, has agreed that “[t]here really isn’t a market . . . to understand (as it relates [to ratings and reviews]), it is [Bazaarvoice] or PowerReviews.” Additionally, PowerReviews’ CEO, Ken Comée, and PowerReviews’ Chief Financial Officer, Keith Adams, acknowledged that the combination of Bazaarvoice and PowerReviews would create a “[m]onopoly in the market” when evaluating the anticipated benefits of the acquisition.

36. The commanding position occupied by Bazaarvoice and PowerReviews is also readily apparent from their combined market share in the Internet Retailer 500 (“IR 500”), which is an annual ranking of the 500 largest internet retailers in North America according to online sales revenue. Bazaarvoice regularly tracks its IR 500 market position, and company executives

considered the impact that the acquisition of PowerReviews would have on Bazaarvoice's IR 500 market share. For example, in the diligence memorandum prepared for the company's board of directors, Bazaarvoice executives wrote, "[PowerReviews'] customer base includes 86 IR 500 retailers who have resisted becoming Bazaarvoice customers despite significant attempts to displace [PowerReviews] from these accounts" and noted that the acquisition of PowerReviews would "immediately increase the IR 500 penetration of Bazaarvoice by 49%." Within the IR 500, more than 350 retailers collect and display ratings and reviews. Approximately 70% of these firms use a PRR platform provided by Bazaarvoice or PowerReviews. Most of the remaining websites use in-house PRR solutions.

37. In addition to purchasing a PRR platform from a commercial supplier, a retailer or manufacturer seeking to include ratings and reviews on its website may elect to develop an in-house PRR solution. For many retailers and manufacturers, however, it is impractical and cost-prohibitive to build an internal solution that can satisfy their business requirements. Accordingly, the acquisition particularly harms retailers and manufacturers for which an in-house solution is not an economically viable alternative.

38. For many retailers and manufacturers, in-house PRR solutions are not sufficiently close substitutes to Bazaarvoice's platform to impede a post-merger price increase by Bazaarvoice. It would be prohibitively expensive for many customers to develop a PRR solution with functionality comparable to the features offered by Bazaarvoice, and it would be difficult to maintain the same pace of innovation. Moreover, it would be very complex and expensive for a customer to perform the same level of moderation. In-house solutions are only a viable option for customers that are not interested in the full feature set offered by Bazaarvoice (including moderation and syndication services), or customers that are willing to invest heavily in ongoing platform development to maintain the software and create new features.

39. Bazaarvoice is able to use information obtained during the sales process to determine whether an in-house PRR solution is an economically viable alternative for a particular customer. Accordingly, in light of the merger, it will be a profit-maximizing strategy for Bazaarvoice to impose targeted price increases on customers that do not consider in-house solutions to be a viable alternative. Faced with an anticompetitive post-merger price increase, these customers would not develop an in-house solution or abandon ratings and reviews altogether.

40. Other social commerce products, including community platforms, forums, and question and answer (“Q&A”) platforms, are also not substitutes for PRR platforms. These other social commerce products do not collect the same type of structured, product-level data associated with ratings and reviews. Because PRR platforms and other social commerce products serve different purposes, retailers and manufacturers routinely use PRR platforms in combination with one or more other social commerce products.

41. As a result of Bazaarvoice’s acquisition of PowerReviews, customers will lose critical negotiating leverage. The elimination of PowerReviews has significantly enhanced Bazaarvoice’s ability and incentive to obtain more favorable contract terms. Accordingly, many retailers and manufacturers will now obtain less favorable prices and contract terms than Bazaarvoice and PowerReviews would have offered separately absent the merger.

B. PowerReviews’ “scorched earth approach to pricing” applied significant pressure to Bazaarvoice in competitive deals.

42. Price competition with Bazaarvoice was a core component of PowerReviews’ business strategy. PowerReviews positioned itself as a low-price alternative to Bazaarvoice and aggressively pursued Bazaarvoice’s largest clients. The company set an internal goal to “[b]e in every deal [Bazaarvoice] is in,” and encouraged price competition by building a “cost structure

to support price compression.” As a result of price competition between Bazaarvoice and PowerReviews, manufacturers and retailers obtained substantial discounts—sometimes in excess of 60%.

43. PowerReviews’ aggressive approach to pricing frequently forced Bazaarvoice to defend its more expensive list prices. Responding to competitive pressure from PowerReviews in July 2011, Bazaarvoice’s Vice President of Retail Sales warned, “[PowerReviews] has been VERY active in almost all of our deals from small to large” (emphasis in original). He claimed that PowerReviews had adopted a “scorched earth approach to pricing,” which “force[d] all of [Bazaarvoice’s] current prospects and customers to at least understand how and why there is such a [difference] in price.”

44. If a prospective customer was unwilling to pay a premium over the PowerReviews price, Bazaarvoice often responded with substantial price discounts. Bazaarvoice frequently matched the PowerReviews price or offered a more favorable price than PowerReviews. Tony Capasso, a Vice President of Sales for Bazaarvoice, described this trend in a 2011 e-mail regarding an apparel manufacturer’s consideration of PowerReviews: “[L]ate adopters see us as the stronger brand but struggle to justify 2X-3X greater costs for a solution that looks somewhat the same. Even when we do show differences some [prospects] don’t put enough stock in those differences to justify the price [difference]. We may need to battle on price in this case” Bazaarvoice ultimately offered to match the price that PowerReviews had offered the apparel retailer, which represented a substantial discount from its initial proposal.

45. Even if PowerReviews was unable to win a customer’s business, its low prices set the bar for negotiations and compressed Bazaarvoice’s margins. Bazaarvoice employees viewed PowerReviews as “an ankle-biter that cause[d] price pressure in deals,” and acknowledged that

many customers brought PowerReviews into negotiations as a “lever to knock [Bazaarvoice] down on price.”

46. PowerReviews also pursued Bazaarvoice’s installed customer base. In some cases, PowerReviews convinced Bazaarvoice customers to switch platforms. In other cases, an offer from PowerReviews provided additional leverage for the customer to negotiate more favorable terms from Bazaarvoice. In 2011, Alan Godfrey, Bazaarvoice’s General Manager of North American Retail, described this competitive dynamic as a “full frontal assault” by PowerReviews that was “successfully penetrating the [executive] ranks of [Bazaarvoice’s] anchor clients and convincing them to evaluate alternatives, or at least, negotiate [Bazaarvoice] to lower price points.”

47. PowerReviews’ efforts to target existing Bazaarvoice customers did not go unnoticed. In July 2011, PowerReviews convinced a large electronics retailer to reevaluate its relationship with Bazaarvoice. Afterwards, Mike Svatek, Bazaarvoice’s Chief Strategy Officer, expressed concern that Bazaarvoice was “seeing new competitive pressure” from PowerReviews through an “aggressive blitz campaign.” Svatek believed Bazaarvoice needed to “eradicate” PowerReviews, and he proposed a counterattack on the PowerReviews base. He advocated an “aggressive” approach to “unseat” PowerReviews from three of its largest accounts.

48. It was common for Bazaarvoice to pursue PowerReviews customers in this fashion. For example, in response to a PowerReviews campaign targeting Bazaarvoice’s manufacturing clients, Bazaarvoice put into motion a plan to “steal one or more major [PowerReviews] clients . . . by offering them something they can’t refuse.” This strategy was intended to send a signal to PowerReviews that Bazaarvoice was willing “to absorb some pain in return for handing [PowerReviews] major client losses.” In at least two cases, Bazaarvoice offered to provide its PRR platform to large PowerReviews customers for free.

49. Before the acquisition, a number of manufacturers and retailers switched between the Bazaarvoice and PowerReviews platforms. Many times these switches were spurred by aggressive offers that were intended to displace the incumbent PRR platform provider. As a result of the acquisition, however, Bazaarvoice will no longer need to “absorb some pain” to attract PowerReviews clients to the Bazaarvoice platform or retain customers in the face of lower prices from PowerReviews. When recommending the transaction to the company’s board of directors, Bazaarvoice executives noted that the transaction would enable Bazaarvoice to acquire large PowerReviews customers that had “resisted becoming Bazaarvoice customers despite significant attempts to displace [PowerReviews].” Absent the transaction, they believed it was “unlikely that [Bazaarvoice could] attract these retailers to [its] platform in the foreseeable future nor [sic] without significant cost.”

C. Bazaarvoice and PowerReviews engaged in “feature driven one-upmanship,” which drove both firms to innovate and develop new PRR platform features.

50. As PowerReviews and Bazaarvoice grappled to differentiate their product offerings, they developed new features and improved the functionality offered by their respective platforms. Pehr Luedtke, PowerReviews’ former CEO, described the pattern of innovation competition between Bazaarvoice and PowerReviews in a 2010 e-mail to a large consumer products retailer: “[T]here are a lot of similarities between Bazaar[v]oice and PowerReviews when it comes to features . . . we have constantly traded places in terms of who leads and who fast follows.” Feature-driven competition between Bazaarvoice and PowerReviews hastened the pace of innovation and made ratings and reviews an increasingly attractive proposition for manufacturers and retailers.

51. For example, PowerReviews began offering an “in-line SEO solution” in January 2009. This was the first PRR platform feature to allow ratings and reviews to be indexed by

search engines directly from the product webpage, rather than a separate website designed for search engine optimization. PowerReviews positioned its SEO feature as a best-in-class offering and targeted the shortcomings of Bazaarvoice's SEO offering during sales calls. Bazaarvoice quickly responded by developing comparable functionality.

52. Bazaarvoice, on the other hand, was the first company to create a review syndication network that connected manufacturers and retailers. PowerReviews responded by creating a similar review syndication feature for its clients. PowerReviews eventually pushed the envelope even further, aggressively marketing an "open" content syndication platform that facilitated syndication between manufacturers that were not PowerReviews clients and retailers using the PowerReviews platform. When PowerReviews announced its open syndication network, it invited all Bazaarvoice manufacturing clients to try its syndication service for free for twelve months.

53. Bazaarvoice's manufacturing clients began to ask Bazaarvoice to syndicate their reviews to retail partners on the PowerReviews platform. Bazaarvoice initially resisted, in an attempt to maintain its "closed" syndication platform. In communicating this approach to Bazaarvoice's sales leadership team, Michael Osborne, Bazaarvoice's Chief Revenue Officer wrote, "[T]ell all of your teams . . . that we do not support syndication outside of our network – and if we get requests for it, escalate to the top immediately. There's a new competitive battle coming." Internally, Bazaarvoice acknowledged that it was "making a strategic choice not to create a custom (and safe) version of [the content] feed for retailers outside of [the Bazaarvoice] network."

54. Finally, Bazaarvoice relented to customer pressure and began developing a new offering to syndicate content to PowerReviews' retailers. In an internal announcement, Erin Defossé, Bazaarvoice's Head of Product Strategy, acknowledged that this move was in response

to PowerReviews' open syndication network. Brett Hurt was optimistic about his company's new approach, stating, "I cannot wait until we turn the tables on PowerReviews with their aggressive push. Our strategy is going to rock them and put them on their heels." He pushed for Bazaarvoice to execute on its plan to "destroy" PowerReviews, urging "[PowerReviews] is not waiting for us I want to aim a big bazooka in their direction."

D. The anticompetitive effects of the transaction will not be counteracted by entry, repositioning, or merger-specific efficiencies.

55. Entry or expansion by other firms is unlikely to alleviate the competitive harm caused by the transaction. Since its founding, Bazaarvoice has been the largest commercial provider of PRR platforms, and PowerReviews was its closest competitor. Other providers exist, but they have struggled to win customers and gain market share. Bazaarvoice's competitive position is protected by substantial barriers to entry.

56. Bazaarvoice's syndication network is a formidable barrier to entry in the market for PRR platforms. As more manufacturers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable to retailers because it will allow them to gain access to a greater volume of ratings and reviews. Similarly, as more retailers purchase Bazaarvoice's PRR platform, the Bazaarvoice network becomes more valuable for manufacturers because it will allow them to syndicate content to a greater number of retail outlets. The feedback between manufacturers and retailers creates a network effect that is a significant and durable competitive advantage for Bazaarvoice.

57. Bazaarvoice has acknowledged the importance of its syndication network as a substantial barrier to entry that protects its dominant position. Before its initial public offering in February 2012, Bazaarvoice prepared a document for an investor roadshow in which it explained the "powerful network economies" created by linking retailers to manufacturers. Bazaarvoice

claimed that it competes in a “winner-take-all” market, and identified its “ability to leverage the data” from its customer base as “a key barrier [to] entry.” During investor roadshows, the company boasted, “[A]ny company entering the market would have to start from the beginning by securing all of the retail clients,” which would be difficult because most of the largest retail clients are already using the Bazaarvoice platform. Since its IPO, Bazaarvoice’s SEC filings have continued to identify “powerful network effects” from syndication as a “competitive strength[] [that] differentiate[s] [Bazaarvoice] from [] competitors and serve[s] as [a] barrier to entry.”

58. The acquisition of PowerReviews will extend the reach of Bazaarvoice’s network and deprive its remaining competitors of the scale that is necessary to truly compete. Even before the acquisition, the company boasted to potential investors, “[T]he power of [Bazaarvoice’s] network effect and significant advantage on a global scale is starting to crowd out competition.” As Stephen Collins predicted in October 2011, Bazaarvoice’s acquisition of PowerReviews threatens to “tip the scales in [Bazaarvoice’s] permanent favor on the network front.” During its diligence process for the transaction, Bazaarvoice anticipated that the assimilation of major PowerReviews retailers into the Bazaarvoice network would “further increase[] . . . switching costs” and “deepen[] [its] protective moat.”

59. Bazaarvoice cannot demonstrate merger-specific efficiencies sufficient to counteract the acquisition’s anticompetitive effects.

CAUSE OF ACTION

(Violation of Section 7 of the Clayton Act by Bazaarvoice)

60. The United States realleges and incorporates paragraphs 1 through 59 as if set forth fully herein.

61. Bazaarvoice's acquisition of PowerReviews is likely to substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

62. Among other things, the transaction has had the following anticompetitive effects:

- (a) Significant head-to-head competition between Bazaarvoice and PowerReviews has been extinguished;
- (b) Bazaarvoice has significantly reduced incentives to discount prices, increase the quality of its services, or invest in innovation;
- (c) Prices will likely increase to levels above those that would have prevailed absent the transaction, forcing retailers and manufacturers to pay higher prices for PRR platforms; and
- (d) Quality and innovation for PRR platforms will likely be less than the levels that would have prevailed absent the transaction.

REQUEST FOR RELIEF

63. The United States requests that:

- (a) Bazaarvoice's acquisition of PowerReviews be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;
- (b) the Court order Bazaarvoice to divest assets, whether possessed originally by PowerReviews, Bazaarvoice, or both, sufficient to create a separate, distinct, and viable competing business that can replace PowerReviews' competitive significance in the marketplace;
- (c) the United States be awarded the costs of this action; and
- (d) the United States be awarded any other equitable relief the Court deems just and proper.

Dated: January 10, 2013

For Plaintiff United States:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAZAARVOICE, INC.,

Defendant.

Case No. 13-cv-00133 WHO

**COMPETITIVE IMPACT
STATEMENT**

Judge: Hon. William H. Orrick

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b)-(h), Plaintiff United States of America files this Competitive Impact Statement relating to Plaintiff’s Second Amended Proposed Final Judgment, ECF No. 257, (“Proposed Final Judgment”) submitted on April 24, 2014, for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 12, 2012, Defendant Bazaarvoice, Inc. purchased PowerReviews, Inc. for approximately \$168.2 million. The United States filed a civil antitrust Complaint against Bazaarvoice on January 10, 2013, seeking to unwind the acquisition. The Complaint alleged that the likely effect of this acquisition would be to lessen competition substantially for ratings and reviews (“R&R”) platforms in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition would likely result in higher prices for R&R platforms and less innovation.

This matter was tried before Judge William H. Orrick of the United States District Court for the Northern District of California from September 23, 2013, through October 10, 2013. The parties called numerous fact and expert witnesses via live testimony and video depositions, and offered a combined total of 980 exhibits into evidence.

On January 8, 2014, the Court issued a Memorandum Opinion finding that Bazaarvoice violated Section 7 of the Clayton Act when it acquired PowerReviews, its “closest and only serious competitor.” Mem. Op. at 141. Pursuant to the Court’s Order Regarding Remedy Phase, ECF No. 248, on February 12, 2014, the United States filed a Motion for Entry of Final Judgment setting forth the elements of a remedy for Bazaarvoice’s unlawful acquisition of PowerReviews, along with a memorandum in support thereof. ECF No. 249-3. On March 4, 2014, Bazaarvoice filed its Opposition to Plaintiff’s Motion for Entry of Final Judgment. ECF No. 250-3. The United States filed its Reply Memorandum in Support of its Motion for Entry of Final Judgment, ECF No. 251-3, along with an Amended Proposed Final Judgment, ECF No. 251-5.

On April 24, 2014, the United States filed a Stipulation and Proposed Order along with Plaintiff’s Second Amended Proposed Final Judgment and an Explanation of Consent Decree Procedures. ECF No. 257. These documents are collectively designed to eliminate the anticompetitive effects of the acquisition. The Proposed Final Judgment, which is explained

more fully below, will require Bazaarvoice to divest the assets it acquired from PowerReviews and adhere to other requirements to replace the competition that was lost in the United States R&R platform market when Bazaarvoice acquired PowerReviews.

Specifically, under the Proposed Final Judgment, Bazaarvoice is required to (1) divest all the tangible and intangible assets it acquired as part of the PowerReviews acquisition; (2) license the right to sell Bazaarvoice's syndication services to the acquirer's customers; (3) remove trade secret restrictions on current and former Bazaarvoice employees who are hired by the acquirer; (4) license its patents related to R&R platforms to the acquirer; and (5) give customers the freedom to switch from a Bazaarvoice R&R platform to one provided by the acquirer.

The United States and Defendant have stipulated that the Proposed Final Judgment may be entered after compliance with the APPA. Entry of the Proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE VIOLATION

A. The Defendant and the Transaction

Bazaarvoice provides the market-leading R&R platform to manufacturers and online retailers. Pre-merger, the vast majority of Bazaarvoice's customers purchased its R&R platform, and subscription fees from R&R platforms accounted for the majority of Bazaarvoice's revenue. Bazaarvoice is a publicly traded Delaware corporation headquartered in Austin, Texas.

PowerReviews was Bazaarvoice's closest, and only significant competitor in the provision of R&R platforms to manufacturers and online retailers. Pre-merger, the vast majority of PowerReviews' customers purchased its R&R platform, and subscription fees from R&R platforms accounted for the vast majority of PowerReviews' revenue. PowerReviews was a privately held Delaware corporation headquartered in San Francisco, California. During the 2011 calendar year, the company earned approximately \$11.5 million in revenue.

PowerReviews closed the best quarter in its history just prior to the acquisition.

Bazaarvoice acquired PowerReviews on June 12, 2012. The purchase price for the transaction, including cash and non-cash consideration, was approximately \$168.2 million.

B. The Competitive Effects of the Transaction on the Market for R&R Platforms in the United States

1. Relevant Markets

The Court found that the relevant product market is R&R platforms. Mem. Op. at 41-42. Most online retailers would be unlikely to eliminate R&R entirely because R&R platforms have become a necessary feature for online retailers. *Id.* at 42. Thus, other social commerce products serve a different purpose than R&R platforms, and therefore are not substitutes for such platforms. *Id.* at 46. For that reason, other social commerce products do not substantially constrain prices of R&R platforms. The Court also found that a hypothetical monopolist of R&R platforms would find a non-transitory price increase of five or ten percent profitable because few customers would abandon R&R platforms in response to such a price increase. *Id.* at 125-26.

The United States is the relevant geographic market because a hypothetical monopolist selling all R&R platforms can identify and target price increases to customers operating in the United States, and those customers cannot engage in arbitrage – using platforms sold for use in other countries. *Id.* at 51-53. The Court concluded that it was appropriate to define the geographic market by customer location. *Id.* at 53. *Accord* U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 4.2.2 (2010).

2. Competitive Effects

The Court found that it is probable that Bazaarvoice’s acquisition of PowerReviews substantially lessened competition and will result in higher prices for R&R platforms in the United States. *Id.* at 102-118. To reach this conclusion, the Court found that the United States established a prima facie case that Bazaarvoice’s acquisition of PowerReviews violated Section 7. *Id.* at 62-73. Bazaarvoice’s acquisition of PowerReviews significantly increased concentration in the already highly concentrated R&R platform market. Several different measures of market shares within the relevant market confirmed that, prior to the merger,

Bazaarvoice and PowerReviews were the two leading providers of commercial R&R platforms, with a combined market share in excess of that required for the government to establish its prima facie case.¹ *Id.* at 68-69. Specifically, the two market share measures principally relied upon by the Court gave Bazaarvoice a post-merger market share of 68 and 56 percent, respectively. *Id.* at 64-65.² To further support its market share findings in a case where no “perfect measure” of market share was available, the Court relied on additional market share measures calculated using various other methodologies and data sets. *Id.* at 65-68. These other market share measures were generally consistent with the measures principally relied upon by the Court and confirmed the robustness of the Court’s market share findings. *Id.* at 68. The Court also noted that PowerReviews was Bazaarvoice’s closest competitor. *Id.* at 74.

The Court found that the likelihood of anticompetitive effects was supported by the weight of the evidence produced at trial. *Id.* at 103. More specifically, the transaction is likely to lead to substantially higher prices for customers of Bazaarvoice’s R&R platforms. *Id.* at 102-103. The evidence the Court relied upon included win-loss data found in Bazaarvoice’s Salesforce database, data compiled from “how the deal was done” emails prepared by Bazaarvoice employees in the ordinary course of business, and other documentary evidence prepared in the ordinary course of business. *Id.* at 103-06.

3. Entry and Expansion

The Court found that Bazaarvoice was unable to rebut the United States’ prima facie case by demonstrating that entry or expansion of existing providers would be sufficient to replace the competitive constraint previously provided by PowerReviews. *Id.* at 75-83. The R&R platform market has significant entry barriers. *Id.* at 93. The entry barriers identified by the Court include networks effects from syndication, switching costs, moderation, analytics, and reputation. *Id.* at 93-102. Syndication of R&R has becoming increasingly important to both manufacturers and retailers “because it allows them to obtain more content than they could independently.” *Id.* at

¹ The Court also concluded that the R&R platform market did not contain any rapid entrants who should be assigned market share. *Id.* at 130.

² Post-merger HHIs associated with these market shares were 4,590 and 3,915, with merger-related HHI increases of 2,226 and 1,240, respectively. *Id.* at 69

12. Bazaarvoice recognized that its syndication network differentiated it from its competitors and protected its dominant position. *Id.* at 95. The Court found that these barriers to entry would insulate Bazaarvoice from competition. *Id.* at 102.

None of the fringe competitors have achieved a meaningful level of commercial success; they are not likely, therefore, to provide the same competitive constraint as PowerReviews before it was acquired by Bazaarvoice. *Id.* at 75-76, 132-33. The Court also found that there was no evidence that any large software company was likely to enter the R&R platform market. *Id.* at 87-93.

The Court found that in-house supply of R&R platforms was not a viable alternative to commercial providers of R&R platforms for many customers. *Id.* at 83-86. Several factors, including cost and the need for features such as moderation and syndication, discourage customers from choosing to build in-house R&R platforms. *Id.* at 84-85. Indeed, for customers who desire syndication, in-house supply of R&R platforms is not a viable option. *Id.* at 85. In-house platforms, therefore, are not a significant constraint on Bazaarvoice's pricing.

4. *Efficiencies*

The Court found that the transaction did not, and was not likely to, result in cognizable, merger-specific efficiencies that will be passed through to customers and sufficient to offset the anticompetitive effects of the transaction. *Id.* at 121. Bazaarvoice did not claim that the merger reduced the marginal costs of providing its services. *Id.* at 118. In addition, the Court found there was no evidence that the merger caused increased innovation. *Id.* at 121.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Proposed Final Judgment contains a structural remedy that, along with other remedial measures, eliminates the likely anticompetitive effects of the acquisition in the R&R platform market in the United States. The divestitures and other requirements of the Proposed Final Judgment will create an independent and economically viable competitor to replace the competition that was eliminated when Bazaarvoice acquired PowerReviews. Specifically, the

divestiture of the PowerReviews assets, the license to certain Bazaarvoice patents, the license to sell Bazaarvoice's syndication services, the removal of trade secret restrictions on current and former Bazaarvoice employees, and the freedom for customers to switch from a Bazaarvoice R&R platform to one provided by the acquirer, will provide the acquirer of the divestiture assets with the tools needed to compete effectively in the R&R platform market in the United States.

A. The Divestiture

The Proposed Final Judgment requires Bazaarvoice, within ten (10) days after entry of the Final Judgment by the Court, to divest (1) all of the assets Bazaarvoice acquired when it purchased PowerReviews on June 12, 2012; (2) all assets that were acquired, designed, developed, or produced for use with the PowerReviews assets; (3) a license to sell Bazaarvoice's syndication services to the acquirer's customers, along with the technology and know-how to provide such access; (4) a list of customers that have either renewed their contracts or become new customers of Bazaarvoice since June 12, 2012; and (5) a list of any improvements, upgrades or features developed for use with Bazaarvoice's R&R platforms since June 12, 2012.³

Bazaarvoice must divest these assets to an acquirer acceptable to the United States. The United States retains discretion to accept or reject a proposed sale agreement to ensure the acquirer can compete effectively in the business of R&R platforms in the United States. The assets must be divested and/or licensed in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the business of R&R platforms in the United States. Bazaarvoice must take all reasonable steps necessary to accomplish the divestiture quickly. In the event that Bazaarvoice does not accomplish the divestiture within ten (10) days after entry of the Final

³ Unlike the original Proposed Final Judgment and the Amended Proposed Final Judgment previously submitted by the United States, the Second Amended Proposed Final Judgment does not require Bazaarvoice to license a copy of the latest Bazaarvoice R&R platform in the event less than 80 percent of legacy PowerReviews customers remain on the PowerReviews R&R platform. The potential license of the Bazaarvoice R&R platform would only have been triggered if the PowerReviews customer base had diminished substantially at the time of the divestiture sale. Bazaarvoice's agreement to enter into the Proposed Final Judgment requiring the sale of the divestiture assets within ten (10) days of entry of the Proposed Final Judgment will help ensure that a critical mass of customers will remain on the PowerReviews R&R platform at the time it is sold to an acquirer. In addition, Paragraphs Nine and Ten of the Joint Stipulation and Order prohibit Bazaarvoice from migrating legacy PowerReviews customers to a Bazaarvoice platform prior to the sale of the divestiture assets and require Bazaarvoice to incentivize customers to remain on the PowerReviews R&R platform pending the divestiture.

Judgment, the Final Judgment provides that a trustee will complete the divestiture.⁴ The trustee will be selected by the United States and appointed by the Court.

B. *Syndication Services*

The Court found that “Bazaarvoice’s syndication network is a barrier to entry in the market for R&R platforms,” Mem. Op. at 93, and that “[b]esides PowerReviews, no credible syndication competitor existed.” *Id.* at 98. To better enable the divestiture buyer to successfully replace the competition that PowerReviews would have provided absent the merger, the acquirer must have access to Bazaarvoice’s syndication network while it works to build its own syndication network. Thus, the Proposed Final Judgment requires Bazaarvoice to license the right to sell its syndication services to the acquirer for four (4) years. Section V.A of the Proposed Final Judgment requires Bazaarvoice to provide the acquirer and the acquirer’s customers with access to Bazaarvoice’s syndication network on non-discriminatory terms.⁵ To ensure that the acquirer can offer these services at a competitive price, the Proposed Final Judgment further requires that the fees for providing such services be based only on Bazaarvoice’s actual costs.⁶

These provisions ensure that customers will maintain access to syndication connections between the two platforms after the sale of the divestiture assets. Moreover, these provisions provide clients that switch from Bazaarvoice to the acquirer a guarantee that they will not lose access to their syndication relationships on the Bazaarvoice network. The cross-network syndication provisions in the Proposed Final Judgment are of limited duration sufficient to provide the acquirer time to build its own customer base and establish an independent

⁴ The Proposed Final Judgment gives the United States the option to extend the time Bazaarvoice has to divest the assets up to sixty (60) days.

⁵ Section V.B of the Proposed Final Judgment gives the trustee appointed under Section VI authority to investigate any complaints related to the provision of syndication services.

⁶ The original Proposed Final Judgment and the Amended Proposed Final Judgment previously submitted by the United States contemplated an upfront payment by the acquirer for syndication services. The Second Amended Proposed Final Judgment provides for a cost-based fee for the provision of this service. This change in payment terms will not impair the acquirer’s ability to provide a competitive syndication service.

syndication network without establishing a long-term, on-going relationship between Bazaarvoice and the acquirer as such entanglements between competitors can be problematic.⁷

C. Waiver of Trade Secret Restrictions in Employment Agreements; Employee Hiring Provisions

Section IV.C of the Proposed Final Judgment requires Bazaarvoice to waive trade secret restrictions related to its R&R technology and intellectual property rights for any of its current or former employees who are hired by the acquirer. Through its illegal acquisition of PowerReviews, Bazaarvoice obtained access to PowerReviews' trade secrets, which it could then leverage in its own research and development efforts. Conversely, Bazaarvoice has performed minimal maintenance on the PowerReviews R&R platform since the acquisition. *Id.* at 119. Waiving trade secret restrictions for employees who are hired by the acquirer will ensure that the acquirer, like Bazaarvoice, will benefit from the research and development efforts undertaken by the combined firm after the merger closed. Moreover, the acquirer will be able to hire former Bazaarvoice employees to develop new features without fear of being sued by Bazaarvoice for misappropriation of trade secrets. These provisions are necessary to provide the acquirer with access to the product improvements Bazaarvoice has developed since the transaction closed.

The Proposed Final Judgment also prevents Bazaarvoice from interfering with the acquirer's efforts to hire any current or former Bazaarvoice employees. This will allow the acquirer to negotiate employment agreements with the people who are most knowledgeable about the PowerReviews business and any advancements in R&R platform technology that have occurred since the merger.

D. License to Bazaarvoice Patents

Section V.D of the Proposed Final Judgment requires Bazaarvoice and the acquirer to enter into a patent licensing arrangement. The license shall be provided at no ongoing cost to the acquirer, and it will cover all of Bazaarvoice's patents and patent applications related to R&R platforms as of the date the divestiture assets are sold. This arrangement ensures that

⁷ In order to establish a successful syndication network, a R&R provider needs a sufficient number of manufacturing and retail customers that would be interested in syndicating R&R to each other's websites.

Bazaarvoice will not engage in strategic behavior to raise its rival's costs through litigation related to Bazaarvoice and PowerReviews intellectual property that were commingled through the transaction.

E. Transition Services Agreement

Section IV.G of the Proposed Final Judgment requires Bazaarvoice to provide transitional support services to the acquirer for up to one year following the divestiture. These provisions are necessary to facilitate the seamless transition of the PowerReviews assets from Bazaarvoice to the acquirer. The transition services will ensure that the acquirer is capable of operating the divested assets, and that legacy PowerReviews customers will not experience service disruptions as a result of the divestiture. The agreement is limited to one year to give Bazaarvoice and the acquirer sufficient time to facilitate the transition without creating any unnecessary entanglement between the competitors.

F. Customers' Ability to Switch to the Acquirer

As a result of the merger, new R&R platform customers, and existing Bazaarvoice customers whose contracts came up for renewal, were deprived of the only significant commercial alternative to Bazaarvoice. Since acquiring PowerReviews, Bazaarvoice has expanded its dominant position in the sale of R&R platforms. After acquiring the PowerReviews assets, the acquirer's market share will place it at a disadvantage relative to where PowerReviews would have been today absent the merger. To expand its market share, which is critical to its ability to build an independent syndication network, the acquirer needs an opportunity to effectively solicit Bazaarvoice's customers. As currently structured, Bazaarvoice's contracts could deter its clients switching to the acquirer mid-contract. Bazaarvoice's typical service contracts last for at least a one-year term. Trial Tr. 803:19-804:10. And while the company's former CEO testified at trial that customers typically have a right to terminate their agreements with thirty days notice, *id.* at 804:1-3, that is not always the case.⁸ To provide the acquirer with that opportunity, Section IV.H in the Proposed Final Judgment requires

⁸ In December 2013, press reports indicated that Bazaarvoice sued two of its international customers for breach of contract when they switched to a competitor.

Bazaarvoice to waive breach of contract claims against its customers if they switch to the acquirer during a limited period of time. In addition, Section IV.I in the Proposed Final Judgment will prevent conduct by Bazaarvoice that is intended to inhibit expansion by the divestiture buyer after it acquires the PowerReviews assets.

To supplement the acquirer's efforts to get Bazaarvoice customers to switch to the acquirer's R&R platform and aid in the transition period after the sale of the divestiture assets, Section V.C of the Proposed Final Judgment prohibits Bazaarvoice from soliciting any customers that move to the acquirer's R&R platform for a period of six months after the date of sale. This limited non-solicitation period during the first six months after the sale will allow the acquirer time to develop plans to retain its customers without interference from Bazaarvoice.

G. Trustee

Section VI of the Proposed Final Judgment permits the appointment of a trustee by the United States, in its sole discretion. The United States intends to recommend a trustee for court approval. The trustee will be responsible for monitoring Bazaarvoice's compliance with the Final Judgment, and, if necessary, selling the divestiture assets. The trustee's monitoring duties include investigating complaints regarding Bazaarvoice's provision of syndication services to the acquirer's customers and the provision of transition support services. In the event Bazaarvoice fails to sell the divestiture assets pursuant to Section IV of the Proposed Final Judgment, the trustee will also be responsible for selling the divestiture assets.

The Proposed Final Judgment also provides that Bazaarvoice will pay all costs and expenses of the trustee. The trustee will have access to all personnel, books, records, and information necessary to monitor Bazaarvoice's compliance with the Proposed Final Judgment and, if necessary, effectuate the sale of the divestiture assets. After the trustee's appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture and monitor Bazaarvoice's compliance with the Final Judgment.

H. *Stipulation and Order Provisions*

The parties entered into a Stipulation and Order, filed with the Court on April 24, 2014 and entered on April 25, 2014. The Stipulation and Order requires Bazaarvoice to abide by the terms of the Proposed Final Judgment pending its entry by the Court. To ensure that the divestiture assets retain a sufficient customer base to compete effectively in the R&R platform market, Paragraph Nine of the Stipulation and Order prohibits Bazaarvoice from transferring any current users of the PowerReviews R&R platform to a Bazaarvoice R&R platform before the divestiture assets are sold. It also prohibits Bazaarvoice from reaching any agreements with current PowerReviews R&R platform users to transfer them to a Bazaarvoice R&R platform. To further that same goal, Paragraph Ten requires Bazaarvoice to implement a program designed to encourage current PowerReviews R&R platform customers to remain on the platform.

I. *Notification Provisions*

Section XI of the Proposed Final Judgment requires Bazaarvoice to notify the United States in advance of executing certain transactions that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The transactions covered by these provisions include the acquisition of any assets of, or any interest in, a company providing R&R platforms in the United States if the purchase price exceeds \$10,000,000. This provision ensures that the United States will have the ability to take action in advance of transactions that could potentially impact competition in the United States R&R platform market.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the Proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act,

15 U.S.C. § 16(a), the Proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The United States and Defendant have stipulated that the Proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the Proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the Proposed Final Judgment within which any person may submit to the United States written comments regarding the Proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the Proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

James Tierney
Chief, Networks and Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 5th Street NW; Suite 7100
Washington, DC 20530

The Proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered pursuing the remedies set forth in the Amended Proposed Final Judgment, filed with the Court on March 12, 2014, through continued litigation. Continued litigation would have presented both litigation risk and marketplace uncertainty. Moreover, protracted litigation would have magnified the risk of attrition among the PowerReviews customer base. The United States is satisfied that the requirements and prohibitions contained in the Second Amended Proposed Final Judgment provide a prompt, certain, and effective remedy for Bazaarvoice's unlawful acquisition of PowerReviews.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the Proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").⁹

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

⁹ The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).¹⁰ In determining whether a proposed settlement is in the public interest, a district court “must accord deference to the government’s predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.” *SBC Commc’ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be “deferential to the government’s predictions as to the effect of the proposed remedies”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States’ prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. National Broadcasting Co., Inc.*, 449 F.Supp. 1127, 1143 (D.C.Cal. 1978); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” *SBC Commc’ns*, 489 F. Supp. 2d at 17.

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not

¹⁰ *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“the ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged”). Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this court confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11.¹¹

¹¹ See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the Proposed Final Judgment.

Dated: May 8, 2014

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAZAARVOICE, INC.

Defendant.

Case No. 13-cv-00133 WHO

**PLAINTIFF'S SECOND AMENDED
 [PROPOSED] FINAL JUDGMENT**

Judge: Hon. William H. Orrick
 Hearing Date: April 25, 2014
 Time: 9 a.m.

PLAINTIFF'S SECOND AMENDED [PROPOSED] FINAL JUDGMENT

Plaintiff United States of America filed its Complaint on January 10, 2013; Defendant Bazaarvoice, Inc., filed its Answer on February 22, 2013, denying the substantive allegations in the Complaint; this Court having conducted a full trial on all issues of liability and issued its findings of fact and conclusions of law on January 8, 2014, holding that the acquisition of PowerReviews by Bazaarovice violated Section 7 of the Clayton Act, 15 U.S.C. § 18; and

The United States and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment; and

Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court; and

The essence of this Final Judgment is the prompt and certain divestiture of certain assets and rights by Defendant to fully restore the competition eliminated by Bazaarvoice's unlawful acquisition;

It is hereby ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has personal jurisdiction over Bazaarvoice and subject matter jurisdiction under Section 15 of the Clayton Act, 15 U.S.C. § 25.

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity to whom Defendant divests the Divestiture Assets.

B. "Bazaarvoice" or "Defendant" means Bazaarvoice, Inc., a Delaware corporation with its headquarters in Austin, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Divestiture Assets" means

1. All tangible and intangible assets that were acquired by Bazaarvoice when it purchased the PowerReviews business on June 12, 2012, including:

i. All tangible assets that comprise the PowerReviews business, including research and development activities; all personal property, inventory, materials, supplies, office furniture, computer systems, and other tangible property and all assets used in connection with the PowerReviews business; all licenses, permits and authorizations issued by any governmental organization relating to the PowerReviews business; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, relating to the PowerReviews business, including supply agreements; all customer lists, contracts, accounts, and

credit records; and all repair and performance records and all other records relating to the PowerReviews business; and

ii. All intangible assets used in the development, production, servicing and sale of the PowerReviews assets, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, all research data concerning historic and current research and development relating to the PowerReviews assets, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Defendant provides to its own employees, customers, suppliers, agents or licensees, and all research data concerning historic and current research and development efforts relating to the PowerReviews assets, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

2. All tangible and intangible assets, as described above, that were acquired, developed, designed, or produced for use with the PowerReviews assets described in II.C.1 since June 12, 2012.

3. A license, for four (4) years, to sell Bazaarvoice's Syndication Services product or service offering to customers of Acquirer as described in Section V.A.

4. All technology (whether software, hardware, or both), know-how (including trade secrets), and other intellectual property rights necessary for Acquirer to provide access to Bazaarvoice's Syndication Services to its customers.

5. A list of all of Defendant's customers that either (1) renewed a contract for the provision of a PRR Platform with Defendant since June 12, 2012, or (2) became a new customer of Defendant for a PRR Platform since June 12, 2012. Such list shall include the name of each such customer and the date on which the customer's contract expires and/or is up for renewal.

6. A list of each feature, improvement, upgrade or any other technology related to PRR Platforms that Defendant developed since June 12, 2012 for use with Bazaarvoice's PRR Platform(s).

D. "PowerReviews" means (1) PowerReviews, Inc., the company that was acquired by Bazaarvoice on June 12, 2012, and (2) all the assets formerly of PowerReviews, Inc.

E. "PowerReviews Enterprise Platform" means all PowerReviews PRR Platform products except for PowerReviews Express (also referred to as Bazaarvoice Express) products and the Buzzillions web product.

F. "PRR Platform" means the front-end and back-end technologies, including features such as moderation, syndication, and analytics, that enables the collection, organization, storage, use and display of user-generated product ratings and reviews and related content on a website.

G. "Transition Services Agreement" means an agreement between Defendant and Acquirer for Defendant to provide all necessary transition services and support to enable Acquirer to fully operate the Divestiture Assets and compete effectively in the market for providing PRR Platforms in the United States as of the date the Divestiture Assets are sold.

H. "Syndication Services" means the products and services currently provided by Bazaarvoice, and any successor thereto, that provide the ability to share product ratings and reviews and related content between two or more customers.

III. Applicability

A. This Final Judgment applies to Bazaarvoice as defined above, and all other persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and VI of this Final Judgment, Defendant sells or otherwise disposes of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, Defendant shall require the purchaser to be bound by the

provisions of this Final Judgment. Defendant need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestiture

A. Defendant is ordered and directed to divest the Divestiture Assets within ten (10) days of the entry of the Final Judgment in this matter in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendant agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. Defendant shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendant shall make available such information to the United States and the Trustee at the same time that such information is made available to any other person.

C. Defendant shall provide Acquirer and the United States with information relating to the personnel involved in the production, operation, development and sale of the Divestiture Assets, and all Bazaarvoice PRR Platforms, to enable Acquirer to make offers of employment. Defendant will not interfere with any negotiations by Acquirer to employ any of Defendant's current or former employees. Interference with respect to this paragraph includes, but is not limited to, enforcement of non-compete clauses with regard to the Acquirer, and offers to increase salary or other benefits apart from those offered company-wide. In the event any current or former employee(s) of Defendant accepts an offer of employment with Acquirer within six (6) months of the date of the sale of the Divestiture Assets, Defendant will not seek to

enforce any restrictions against or otherwise prohibit such employee(s) from using or disclosing to the Acquirer any of Defendant's trade secrets, know-how or proprietary information related to PowerReviews' or Defendant's PRR Platform technology in connection with the employee(s)'s employment with Acquirer, nor will Defendant seek to impede or prohibit Acquirer's use of such trade secrets, know-how or proprietary information. Nothing in this paragraph shall prevent Defendant from taking any appropriate legal action against any of Defendant's current or former employees who (1) accept an offer of employment with Acquirer and (2) remove tangible documents (whether in hard-copy or electronic form) or items from Bazaarvoice that contain trade secrets, know-how or proprietary information.

D. Defendant shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant shall warrant to Acquirer that each asset will be operational on the date of sale.

F. Defendant shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. At the election of Acquirer, Defendant and Acquirer shall enter into a Transition Services Agreement for a period up to one (1) year from the date of the divestiture. The Transition Services Agreement shall enumerate all the duties and services that Acquirer requires of Defendant. Defendant shall perform all duties and provide any and all services required of Defendant under the Transition Services Agreement. Any amendments, modifications or extensions of the Transition Services Agreement may only be entered into with the approval of the Court.

H. After the sale of the Divestiture Assets until (1) the expiration of the current PRR Platform contract or (2) one year from the date of the letter described in Section IV.I, whichever is later, for any PRR Platform customer of Defendant that wishes to become a PRR Platform

customer of Acquirer, Defendant shall waive any potential breach of contract claim related to the transfer of that customer from Defendant to Acquirer, notwithstanding any other agreement to the contrary.

I. Within three (3) calendar days of the date of the sale of the Divestiture Assets, Defendant shall send a letter to all persons who were customers of Defendant as of the date of the sale of the Divestiture Assets notifying the recipients of the divestiture and providing a copy of this Final Judgment. The letter shall also specifically inform customers of Defendant's obligations under Section IV.H of this Final Judgment. Acquirer shall have the option to include its own letter with Defendant's letter. Defendant shall provide the United States, and the Trustee, a copy of its letter at least three (3) calendar days before it is sent.

J. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Trustee appointed pursuant to Section VI, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing business of providing PRR Platforms in the United States. The divestiture, whether pursuant to Section IV or Section VI of this Final Judgment,

1. shall be made to an Acquirer that, in the United States' sole discretion, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of PRR Platforms; and

2. shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between Acquirer and Defendant gives Defendant the ability unreasonably to raise Acquirer's costs, to lower Acquirer's efficiency, or otherwise to interfere in the ability of Acquirer to compete effectively.

V. Other Required Conduct

A. Defendant shall provide to Acquirer and Acquirer's customers access to Defendant's syndication network for four (4) years following the date of sale of the Divestiture Assets by:

1. Providing Syndication Services according to the financial terms described in the fee schedule set forth in the definitive divestiture agreement. The pricing contained in the fee schedule shall reflect only Defendant's actual costs in providing the service with no additional fees or charges in connection with the provision of this service. The Acquirer may elect to pay Defendant directly or to have Defendant bill Acquirer's customers for Syndication Services; and

2. Providing Syndication Services on non-discriminatory terms with respect to Defendant's and Acquirer's customers. For the avoidance of doubt, the following is a non-exhaustive list of terms for which Defendant may not discriminate:

- i. speed of content transmission;
- ii. server lag time and/or uptime;
- iii. alignment of product databases;
- iv. database synchronization;
- v. content presentation;
- vi. pricing to Defendant's customers based on syndication partner(s);
- vii. data fields transmitted or utilized; and
- viii. integration with Question and Answer products.

Nothing in this paragraph shall be interpreted to permit Acquirer's customers receiving Syndication Services from Defendant to violate any terms of service that are applicable to all of Defendant's customers receiving Syndication Services.

B. Defendant shall promptly notify the Trustee and the United States of all complaints, whether written or oral, it receives relating to Section V.A of this Final Judgment. The Trustee may conduct an investigation of any complaint and shall submit all findings from any such investigation to the United States and Defendant.

C. Defendant shall refrain from soliciting the customers acquired by Acquirer as part of the Divestiture Assets for six (6) months following the date of sale of the Divestiture Assets.

D. Defendant shall provide to Acquirer, at no cost to Acquirer, an irrevocable, fully paid-up perpetual and non-exclusive license to all Bazaarvoice patents and patent applications related to PRR Platforms issued or filed at the time the Divestiture Assets are sold to Acquirer. Defendant shall not sue any PRR Platform customer of Acquirer for infringement of any patent or patent application issued or filed at the time the Divestiture Assets are sold relating to such customer's use of any PRR Platform or other Divestiture Asset provided by Acquirer.

E. Defendant is prohibited from retaining a copy of or offering for sale any of the Divestiture Assets described in Section II.C.1 and 2.

VI. Appointment of Trustee

A. Upon application of the United States, the Court shall appoint a Trustee selected by the United States and approved by the Court to monitor Defendant's compliance with the obligations set forth in this Final Judgment, and, if necessary, effect the sale of the Divestiture Assets.

B. If Defendant has not sold the Divestiture Assets during the period set forth in Section IV.A, only the Trustee shall have the right to sell the Divestiture Assets. The Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section VI.D of this Final Judgment, the Trustee may hire at the cost and expense of Defendant any investment bankers, attorneys, or other agents, who shall be solely accountable to the Trustee, reasonably necessary in the Trustee's judgment to assist in the divestiture and performance of the other duties required of the Trustee by this Final Judgment. The Trustee shall provide notice to the United States and Defendant of all persons hired by the Trustee, and the terms of such persons' compensation, within one (1) day of hiring.

C. Defendant shall not object to a sale by the Trustee on any ground other than the Trustee's malfeasance. Any such objections by Defendant must be conveyed in writing to the

United States and the Trustee within ten (10) calendar days after the Trustee has provided the notice required under Section VII.

D. The Trustee shall serve at the cost and expense of Defendant, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the Trustee and all costs and expenses so incurred. After approval by the Court of the Trustee's accounting, including any remaining fees for its services and those of any professionals and agents retained by the Trustee, all remaining money shall be paid to Defendant. The compensation of the Trustee and any professionals and agents retained by the Trustee shall be on reasonable and customary terms. With respect to work performed pertaining to the divestiture, incentives based on the price and terms of the divestiture and the speed with which it is accomplished may be provided. If the Trustee and Defendant are unable to reach agreement on the Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court.

E. Defendant shall use its best efforts to assist the Trustee in accomplishing the required divestiture and performing the other duties required of the Trustee by this Final Judgment. The Trustee and any consultants, accountants, attorneys, and other persons retained by the Trustee shall have full and complete access to the personnel, books, records, and facilities of Defendant, and Defendant shall develop financial and other information from Defendant as the Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendant shall take no action to interfere with or to impede the Trustee's accomplishment of the divestiture or any other duties outlined in this Final Judgment.

F. After appointment, the Trustee shall file monthly reports with the United States, Defendant, and the Court setting forth the Trustee's efforts to accomplish the divestiture ordered under this Final Judgment, and Defendant's compliance with the other terms of this Final

Judgment. To the extent such reports contain confidential or highly confidential information under the Protective Order, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after appointment, the Trustee shall promptly file with the Court a report setting forth (1) the Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Trustee's recommendations. To the extent such reports contain confidential or highly confidential information under the Protective Order, such reports shall not be filed in the public docket of the Court. The Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the Final Judgment. The Court thereafter shall enter such orders as it deems appropriate to carry out the purpose of the Final Judgment.

H. The Trustee shall serve until four (4) years following the date of sale of the Divestiture Assets.

I. If the United States determines that the Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Trustee.

VII. Notice and Court Approval of Proposed Divestiture

A. Within one (1) calendar day following execution of a definitive divestiture agreement, Defendant or the Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States and the Court of any proposed divestiture required by Section IV or VI of this Final Judgment. If the Trustee is responsible, the Trustee shall

similarly notify Defendant; if Defendant is responsible, it shall similarly notify the Trustee. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within three (3) calendar days of receipt by the United States of such notice, the United States may request from Defendant, the proposed Acquirer, any other third party, or the Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendant and the Trustee shall furnish any additional information requested within five (5) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within twenty-one (21) calendar days after receipt of the notice or within fifteen (15) calendar days after the United States has been provided the additional information requested from Defendant, the proposed Acquirer, any third party, and the Trustee, whichever is later, the United States shall provide written notice to Defendant and the Trustee stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendant's limited right to object to the sale under Section VI.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section VI shall not be consummated. Upon objection by Defendant under Section VI.C, a divestiture proposed under Section VI shall not be consummated unless approved by the Court.

VIII. Financing

Defendant shall not finance all or any part of any purchase made pursuant to Section IV or VI of this Final Judgment.

IX. Affidavits

A. Within twenty (20) calendar days of the entry of this Final Judgment, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or VI, Defendant shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or VI of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendant has taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information.

B. Within twenty (20) calendar days of the date of the sale of the Divestiture Assets, Defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendant has taken and all steps Defendant has implemented on an ongoing basis to comply with Section V of this Final Judgment. Defendant shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendant's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendant shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative

of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant, be permitted:

1. Access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendant shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. If at the time information or documents are furnished by Defendant to the United States, Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under the Protective Order, then the United States shall give Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendant, without providing advance notification to the Antitrust Division, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in a person providing PRR Platforms in the United States during the term of this Final Judgment if the purchase price of such assets or interest exceeds \$10,000,000.

B. Such notification shall be provided to the Antitrust Division in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about PRR Platforms. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendant shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendant may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

IT IS SO ORDERED.

Dated: _____

HON. WILLIAM H. ORRICK
United States District Judge